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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)))))	MM Docket No. 92-264

MOTION TO LIFT STAY

Center for Media Education (CME) and Consumer Federation of America (CFA), hereby move the Commission to lift the stay of the effective date of the horizontal ownership limits promulgated in Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Second Report and Order, FCC No. 93-456 (rel. Oct. 22, 1993), summarized in the Federal Register, 58 Fed. Reg. 60135 (Nov. 15, 1993) ("Second Report and Order"). The stay has the effect of delaying the implementation of the Commission's rules pending an appellate decision in Daniels Cablevision, Inc. v. United States, 1993 U.S. Dist. LEXIS 12806, 1 (D.D.C. 1993), app. filed Nov. 15, 1993.

CME and CFA contend that the Commission's stay of the effective date of its rules is unnecessary. Although the District Court in Daniels found the horizontal subscriber limits to be unconstitutional and enjoined enforcement of those limits, it also stayed the injunction pending completion of the appeal. Id. at 2, 27. The Commission's stay, in effect, cancels out the Court's stay, resulting in a situation where there are no

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regulations controlling the growth of cable systems while the constitutionality of the limits is being appealed.

A stay is typically granted to preserve the *status quo*. See Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 4 (1942) (Stay may be granted "in order to preserve the *status quo*"); Murray v. Kunzig, 462 F.2d 871, 880 (D.C. Cir. 1972) (Stay was "proper . . . to preserve the *status quo*"). This is not a typical situation. Here, the *status quo* will not be preserved unless the Commission lifts the stay of the horizontal limits.

Each of the four factors typically considered in granting a stay[1] support a return to the *status quo*, i.e., lifting the Commission's stay so that the court's stay can take effect will achieve that goal. First, the United States and the FCC have appealed the Daniels decision, Time Warner Entertainment, Inc. v. FCC and the United States, Civil Action No. 92-2494 (filed November 15, 1993) and, on review, are likely to prevail on the merits.

The Daniels court analysis of the horizontal ownership limits was cursory and relied on a single case, the 1936 Grosjean decision. Daniels, 1993 U.S. Dist. LEXIS at 20. In Grosjean,

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[1] The four factors considered when granting a stay are: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? (2) Has the petitioner shown that without such relief, it will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? (4) Where lies the public interest? Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842 (D.C. Cir. 1977), citing Virginia Petroleum Jobber's Ass'n v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958).

the Court held unconstitutional a state tax that had the primary intent of curtailing the circulation of certain newspapers and not, as asserted, to raise money. Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). The Grosjean Court compared the tax to historical newspaper taxes that were intended to stop the flow of information about the government to the people. Id. at 247-49.

The intent behind the horizontal limits in Daniels is not to inhibit the flow of information. Rather, the horizontal limits are intended to stimulate competition in the cable industry and prevent cable operators from "unfairly imped[ing] . . . the flow of video programming from the programmer to the consumer." 47 U.S.C. § 533(f)(2)(A)(1993). Thus, the district court's reliance on Grosjean is in error.[2]

In addition, the district court's conclusion that the horizontal limits are unduly burdensome because they leave operators without any "intra-medium" means of speaking to the remainder of its potential customers, is simply wrong. Daniels, 1993 U.S. Dist. LEXIS at 21. The court overlooks the fact that cable operators do have alternative means of speaking to their non-subscribers available, and they use them quite frequently. For example, cable operators license their programming to other cable systems for broadcast outside of their coverage area.

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[2] In addition, the Court failed to consider the impact of a later Supreme Court case, FCC v. National Citizens Commission For Broadcasting, 436 U.S. 775 (1978), upholding horizontal limits in another context - the newspaper/broadcast cross-ownership rules.

Cable operators can also license their programming to broadcasters around the country, as well as speak through any one of the large number of print publications available. Cable operators may also lease channels on unaffiliated cable systems. Thus, the regulations do not limit cable operator's First Amendment rights, and indeed advance the First Amendment rights of consumers to receive information from diverse sources. The district court's conclusion that horizontal limits are unconstitutional is therefore likely to be reversed on appeal.

Second, lifting the stay during litigation of Daniels will not result in irreparable harm to cable operators. Under the Commission's horizontal limits, all cable systems will still be able to expand during the litigation of Daniels. Currently, the top six cable systems, and their respective share of the national market, are: TCI - 27%; Time Warner - 12%; Continental - 5%; Comcast - 4%; Cox and Cablevision Systems - 3%. *Fiber to 25% of Homes; Cablevision Systems Adds to Rapid Fiber Growth in Cable Systems*, COMMUNICATIONS DAILY, February 26, 1993, at 6. Only one system, TCI, is close enough to the ownership limit of 30% (35%, if minority owned) of the market to be likely to be burdened at all by the regulations. However, even if TCI is harmed because of the lifting of the stay, the harm is not irreparable. TCI would only suffer a temporary inability to expand beyond the 30% limit.

On the other hand, a continuance of the stay while Daniels is being appealed could result in harm to both other interested parties -- the video programmers and the public. The horizontal limits were intended to ensure that "no cable operator . . . can intentionally impede . . . because of the size of an individual operator . . . the flow of video programming from the video programmer to the consumer." 47 U.S.C. § 533(f)(2)(A). If cable operators are allowed to expand without restriction, there is a substantial likelihood that TCI could grow beyond the 30% limit prior to the final decision in Daniels, and thus be able to impede the flow of video programming to the consumer. That TCI is likely to expand is evidenced by the fact that TCI entered into 482 cable system acquisitions from 1974 to 1990, a rate of one deal every two weeks. L.J. Davis, Cable Television; Television's Real-Life Cable Baron, N.Y. Times, December 2, 1990, § 6 (Magazine), at 16. TCI's proposed merger with Bell Atlantic will provide the MSO with the necessary capital to pursue further acquisitions.

The likelihood that TCI would grow beyond the 30% limit while the Daniels appeal is pending presents another good reason why the Commission should lift the stay. In the Further Notice the Commission stated that it "favor[ed] a 25% limit because it will not require divestiture by any cable operator." Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limitations and Anti-trafficking Provisions, Report and Order and Further Notice of Proposed Rule Making, 8 FCC Rcd 6828, 6850, ¶ 147 (1993) ("FNPRM"). In deciding to adopt a 30% limit instead of the proposed 25%, the Commission focused primarily on the fact that Congress did not explicitly direct it to force divestiture of existing systems. Second Report and Order at 14, ¶27. The Commission noted that TCI controls 27% of homes passed by cable and it did not want to force TCI to divest. Id. at 14, n.40. Thus, the Commission should lift the stay while the Daniels appeal is pending to prevent having to face the issue of divestiture once again.

In conclusion, the public's interest will be best served if the Commission lifts its stay on the effective date of the cable horizontal ownership regulations. Because Daniels is likely to be reversed on its merits on appeal, and because lifting the stay will not result in irreparable harm to anyone, and will in fact benefit both consumers and video programmers, the Commission should lift its stay. The effect of lifting the Commission's stay will be to let the court's stay take effect, thus preserving the *status quo* and insuring that Congress' goal of achieving competition and diversity in the cable television marketplace is realized while the review of the constitutionality of the limits is under consideration.

Respectfully submitted,

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